In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1404

CLARENCE ROBERTS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners are the corporate owner[1] of the fishing boat *Barbara and Gail* and the surviving members or personal representatives of her crew. That rudderless vessel foundered upon the Nantucket Shoals in the winter of 1961 while the Coast Guard was attempting to rescue her and her crew from the North Atlantic. Like the government in No. 1423, this Term, petitioners ask the Court to review the judgment of the court of appeals in *United States* v. *Sandra & Dennis Fishing Corporation*, 372 F. 2d 189 (C.A. 1) (Pet. App. A–31, A–50). That court held the United States liable for the damages resulting from the loss of the *Barbara and Gail*, subject to the government's right

[1] The Sandra & Dennis Fishing Corporation.

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to limit its liability to the value of the Coast Guard rescue vessel under the terms of the Shipowners' Limitation of Liability Act.[3]

The maritime accident from which this litigation flows is described both in the opinion of the court of appeals (Pet. App. A-32—A-49) and in the government's petition for certiorari in No. 1423, to which we respectfully refer the Court. Accepting the facts as stated by the court of appeals, the government's petition seeks review of the legal correctness of the First Circuit's imposition of liability upon the United States in circumstances where maritime law would not hold a private rescuer responsible, a ruling in conflict with decisions of other circuits and contrary to the provisions of the Public Vessels Act as interpreted by this Court.

The instant petition is directed toward and seeks review of the First Circuit's additional holding that, based on the facts here involved, the government is entitled to limit its liability under the Shipowners' Limitation of Liability Act, 46 U.S.C. 183 *et seq.*[4]

For the reasons which follow, we think the issues petitioners seek to raise do not warrant further review by this Court.

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[3] 46 U.S.C. 181-189. The Public Vessels Act entitles the United States to such limitation in the same manner as private shipowners (see 46 U.S.C. 789).

[4] Both the Public Vessels Act and the Suits in Admiralty Act, under which jurisdiction over the United States was asserted in this case, entitle the government to the same limitation of (or exoneration from) liability in maritime accidents as is "accorded by law to the owners, charterers, operators or agents of vessels" (see 46 U.S.C. 740 and 789).

1. Under the Shipowners' Limitation of Liability Act, the liability of a vessel's owner is limited to his interest in the vessel for loss or damage incurred without his "privity or knowledge." 46 U.S.C. 183(a). Those terms in the Act refer to the owner's personal participation in the fault or negligence causing or contributing to the injury. *Coryell* v. *Phipps*, 317 U.S. 406, 411. In other words, the shipowner is not precluded from limiting his liability for maritime injuries caused by the negligent acts of his employees or agents unless he has personally been privy thereto.[4] And where corporate shipowners are involved, the privity or knowledge must be that of its "managing officers" before the corporation may be charged with liability in excess of the value of its vessel.[5] The same rule applies to the government as a shipowner.[6]

Where an injury is the result of faulty seamanship or navigational errors committed after the vessel has commenced its voyage, the cause of loss has been consistently held to be without the owner's "privity or knowledge".[7] This settled rule is founded on the premise that the owner ashore has no effective control

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[4] See, *e.g.*, *Continental Ins. Co.* v. *Sabine Towing Co.*, 117 F. 2d 694, 697 (C.A. 5), certiorari denied, 313 U.S. 588.

[5] *Spencer Kellogg & Sons, Inc.* v. *Hicks*, 285 U.S. 502, 510–512; *Craig* v. *Continental Ins. Co.*, 141 U.S. 638, 646–647.

[6] *Austerberry* v. *United States*, 169 F. 2d 583, 593–594 (C.A. 6).

[7] See, *e.g.*, *La Bourgogne*, 210 U.S. 95, 122; *Oliver J. Olson & Co.* v. *Luckenbach S.S. Co.*, 279 F. 2d 662, 672–673 (C.A. 9); *The George W. Pratt*, 76 F. 2d 902 (C.A. 2); *Petition of Marina Mercante Nicaraguense, S.A.*, 248 F. Supp. 154, 165 (S.D. N.Y.), modified on other grounds, 364 F. 2d 118 (C.A. 2); *Timur Fishing Corp.* v. *Cap'n Bill, Inc.*, 160 F. Supp. 633 (D. Mass.).

over his vessel once underway, but is compelled to rely on the skill and judgment of those to whom he has entrusted its operation. *Spencer Kellogg & Sons, Inc. v. Hicks*, 285 U.S. 502, 511-512.

In the instant case, after a careful review of the lengthy record, the court of appeals unanimously concluded that the stranding of the *Barbara and Gail* was caused solely by "navigational errors" on the part of the officer commanding the Coast Guard rescue vessel, expressly rejecting the contention asserted by petitioners that deficiencies in the rescue vessel's equipment caused the loss (Pet. App. A-48). In reversing the lower court's refusal to allow limitation, the First Circuit explained (Pet. App. A-48-49):

> Very possibly the district court's refusal to limit liability was based upon its misconception as to the effect of the defective equipment. In all events, it was mistaken. The government, like a private owner, is entitled to the benefits of the limitation statutes. 46 U.S.C. § 746. When the nature of the fault or faults is examined, which we have done with close attention because of this ultimate question, we consider this a clear case. The Coast Guard supplied McManus with a vessel capable of performing the intended mission if properly operated, especially since the vessel to be assisted could furnish any needed loran position for the asking. The strand resulted from his lack of care and failure to exercise judgment. For this the government is liable; but it is likewise entitled to limit.

This aspect of the decision below is plainly correct. As the cases cited previously make clear, if the strand-

ing was caused by errors in seamanship not attributable to "managing officers" ashore, the government was entitled to limit its liability because the loss was caused by acts done without its privity or knowledge.* Since "[p]rivity, like knowledge, turns on the facts of particular cases," *Coryell* v. *Phipps*, 317 U.S. at 411, review by this Court solely to reexamine the court of appeals' analysis of facts peculiar to this case is not warranted. See *Southern Power Co.* v. *North Carolina Public Service Co.*, 263 U.S. 508; *Houston Oil Co.* v. *Goodrich*, 245 U.S. 440.

2. As noted above, the court of appeals held the government liable to petitioners in circumstances where a private voluntary salvor would not have been held responsible. Petitioners urge, as a basis for a grant of certiorari, that the court of appeals should have held the government liable by applying a different, more stringent standard (Pet. 10–11). But application of the higher standard contended for by petitioners—that the government "was obligated to use due care to maintain its [rescue] vessels and equipment in reasonably good working order" (Pet. 11)—would not affect the government's right to limit its liability (the portion of the judgment below ad-

*Thus, whether the Coast Guard vessel was a "seagoing vessel" so that, under 46 U.S.C. 183(e), the privity or knowledge of its master, "at or prior to the commencement of [its] voyage," should "be deemed conclusively the privity or knowledge of the owner of such vessel," in respect of "loss of life or bodily injury," is irrelevant. Since the government's liability was predicated on navigational errors, as to which knowledge prior to the mission could not have existed, petitioners' discussion of this point (Pet. 11–12) is not pertinent.

verse to petitioners).[9] For, as noted earlier (*supra*, p. 4), the court of appeals expressly found the cause of the stranding to be "navigational errors", not deficient equipment. Petitioners of course have no occasion to invoke this court's jurisdiction insofar as the judgment below is favorable to them. Cf. *Public Service Comm'n* v. *Brashear Lines*, 306 U.S. 204, 206.

3. Finally, petitioners' suggestion that the court of appeals failed to apply the "clearly erroneous" standard in reviewing the facts as found by the district court is not well taken. The First Circuit was well aware that this test is applicable in admiralty as in other appeals[10] and, as its opinion shows, applied it in this case (see, *e.g.*, Pet. App. A–46–47).

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[9] For this reason, petitioners' reliance (Pet. 3, 11) on an alleged conflict between the court of appeals' decision and this court's decision in *Indian Towing Co.* v. *United States*, 350 U.S. 61, as a reason for granting certiorari, is misplaced. In any event, as the court below pointed out, no such inconsistency in fact exists (see Pet. App. A–40).

[10] See, *e.g.*, *Alcoa S.S. Co.* v. *Watson*, 313 F. 2d 522, 523 (C.A. 1); *American Union Transport Co.* v. *Aguadilla Terminal, Inc.*, 302 F. 2d 394, 396 (C.A. 1); and *Morales* v. *Bull S.S. Co.*, 279 F. 2d 299, 301 (C.A. 1).

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

CARL EARDLEY,
Acting Assistant Attorney General.

MORTON HOLLANDER,
RICHARD S. SALZMAN,
Attorneys.

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